

Labor Ready, Inc. and Tri-State Building and Construction Trades Council, National Building and Construction Trades Department, AFL-CIO.
Case 9-CA-34950

March 26, 1999

DECISION AND ORDER

BY MEMBERS FOX, HURTGEN, AND BRAME

On May 14, 1998, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.²

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issues and the positions of the parties.

² We note that those aspects of the Respondent's no-solicitation policy that pertain to distribution were not placed at issue in this proceeding.

We also note that the Respondent does not except to the judge's finding that its no-solicitation policy was maintained and in effect at all of its offices. Nor does the Respondent contest that it barred Donald Huff from all of its offices. Accordingly, we agree with the judge that nationwide posting of the remedial notice is appropriate.

In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(1) of the Act by its no-solicitation rules, we emphasize the particular facts of this case. Accordingly, we find it unnecessary to address our concurring colleague's concerns involving other factual contexts.

Member Brame notes that although the Board has stated that the General Counsel bears the burden of proving gross backpay, see, e.g., *Coca-Cola Bottling Co. of Buffalo*, 313 NLRB 1061 *fn.* 2 (1994), the Board has applied a "broad standard" permitting the General Counsel to meet his burden by providing only a "reasonable" method of calculating gross backpay. See, e.g., NLRB Casehandling Manual (Part 3), Compliance, Sec. 10532.1; and *Am-Del-Co.*, 234 NLRB 1040, 1042 (1978). Member Brame points out that in the present case the Respondent's employees worked for its clients usually on a "daily ticket" and occasionally on a "weekly ticket" basis, rather than for the duration of its clients' projects or for indefinite periods. He further notes that the Respondent presented testimony that, since the opening of its South Charleston, West Virginia office, its employees working in West Virginia averaged 105 working hours before they were hired by other employers or no longer sought work with the Respondent. In these circumstances, Member Brame would find that the General Counsel in compliance must do more than advance a "reasonable" formula for the calculation of backpay; rather he must bear the burden of proving the days that Huff would have worked but for the Respondent's discrimination against him. See *NLRB v. Fluor Daniel, Inc.*, 103 F.3d 818 (6th Cir., Nov. 16, 1998). See also Member Brame's position in *Grand Rapids Press of Booth Newspapers*, 327 NLRB No. 72, slip op. at 1 *fn.* 2 (1998).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Labor Ready, Inc., South Charleston, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER HURTGEN, concurring.

Although I agree with my colleagues that the Respondent's conduct was unlawful, I write separately to state my view that the holding of this case should be limited to cases arising in similar settings.

The Respondent supplies temporary workers. At its offices, people fill out applications and await referrals to work elsewhere. Thus, the applicants, whose signatures Donald Huff sought for his petition, do not perform work at the Respondent's premises. Indeed, all that occurs there is the application and referral process.

As properly found by the judge, Huff was an "employee," not only because he was applying for a job, but also because he had received assignments from the Respondent, his application was on file, and he was awaiting further referrals. And, his presence at the Respondent's office was compelled by the Respondent's policy change mandating that those seeking referrals be physically present in order to receive job assignments.

Under these circumstances, I believe that it is reasonable to find, as we do here, that the Respondent's attempts to prevent Huff from circulating a petition seeking a return to the Respondent's previous referral policy were unlawful. Huff's solicitation of those who filled out applications and awaited referrals to many different jobsites occurred at "the very time and place uniquely appropriate" for such activity, in "the natural place for workers to talk to one another" on such an issue. *Republic Aviation Corp.*, 51 NLRB 1186, 1195 (1943), *enfd.* 142 F.2d 193 (1944), *affd.* 324 U.S. 793 (1945).

I know of no case expressly holding that applicants must be treated as employees *for the purposes of no-solicitation rules*. Accordingly, we are, at least to that extent, dealing with an issue of first impression. I therefore believe that we should provide some guidance concerning the boundaries of our holding in this case.

I have two specific concerns. First, the *Republic Aviation* rule gives *working employees* the right to engage in Section 7 activity on the employer's property, subject to certain limitations. The rationale is that working employees are rightfully on the property, and the workplace is a natural gathering place for them. The issue here is whether applicants are like "working employees" in this respect, and whether the place of application is a natural gathering place for them.

Second, two of the limitations on Section 7 activity are that the employer can limit solicitation to nonwork times, and can limit distribution to nonwork areas. The issue

here is whether the Section 7 activities in this case fall within those limitations.

As to my first area of concern, I agree that the applicants here were rightfully on the employer's property, and that the application office was a natural gathering place for them. I also note that, after hire, their workplaces would be scattered.

As to my second area of concern, I agree that there was no showing here that the Section 7 activity would interfere with work or with the application process.

In these narrow circumstances, I agree that Respondent could not lawfully restrict the Section 7 activity. However, I would not apply our holding to all places of business, or offices where applicants apply for work. Rather, I would limit its application to those, like the Respondent's, where essentially all that occurs is the referral of people to work at job sites elsewhere and where the referral office is the "natural" and "uniquely appropriate" meeting place for those applicants. I would emphatically *not* hold that applicants must be treated as employees for the purposes of no-solicitation policies at, for example, places of business where applicants not only fill out applications (e.g., personnel offices) but also, if hired, perform their work. In my view, such a personnel office, unlike the Respondent's office in the instant case, would not be the natural place for Section 7 solicitation among applicants. Further, in such circumstances, the employer could show that the Section 7 activity would be disruptive of the application process.

Mark G. Mehas, Esq., for the General Counsel.

Kevin L. Carr, Esq., Henry C. Bowen, Esq., and, on the brief, *Charles L. Woody, Esq. (Spilman, Thomas & Battle, PLLC)*, of Charleston, West Virginia, for the Respondent.

Thomas G. Williams, of Ashland, Kentucky, for the Charging Party.

DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge. Donald Huff, an employee of the Affiliated Construction Trades Foundation, the fact-gathering arm of Charging Party Tri-State Building and Construction Trades Council, National Building and Construction Trades Department, AFL-CIO (the Union), tried to obtain a construction job through Respondent Labor Ready, Inc. He was prohibited from soliciting other applicants for employment and ultimately told that he was barred from any employment opportunities. The complaint alleges that Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). Respondent denies that it violated the Act in any manner.¹

Respondent is a national supplier of temporary workers for construction, landscaping, warehousing, catering, moving, hotel cleaning, and light industrial markets from its approximately

270 locations in the United States, including its facilities at South Charleston and Huntington, West Virginia. These locations are essentially hiring or referral halls, with the exceptions that the employees sent to work by Respondent are employed by it and not the businesses that use the employees' services. During the 12 months preceding August 12, 1997, Respondent performed services valued in excess of \$50,000 in States other than West Virginia. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Persons seeking to be referred to a worksite by Respondent are required to complete an application, in which they state their work qualifications and acknowledge and agree to Respondent's dispatch procedures, as follows:

I understand that I am not required to work on any particular day and whether I report in to the LABOR READY, INC. dispatch hall is always my choice. Whenever I wish to register my availability to work, I will visit the dispatch hall and sign in. I know that LABOR READY, INC. is not required to find work for me and is not required to contact me in any way in order to make work available to me. If I do not report to the dispatch hall and sign in, LABOR READY, INC. may assume that I am not available for work on that day.

I understand that after receiving a job assignment, I am free on my own time to leave the dispatch hall and do as I wish until the job assignment starts. . . .

If I have a REPEAT TICKET (defined as a request to return to the same job at a later date), I know that I am required to report my availability to LABOR READY, INC. in the manner indicated by the dispatcher at least one (1) hour before the scheduled start time and that if I do not, then LABOR READY, INC. may assume that I am not available to return to work.

I understand that my employment with LABOR READY, INC. is on a day-to-day basis. That is, at the end of the work day, I will be deemed to have quit unless and until I request and receive a work assignment at a later date.²

Applicants also had to read a safety book and pass a safety test of 20 questions based on material in that book. Whether they were also required to view a 45-minute safety videotape, which was run continuously on a television monitor in Respondent's office, as Michael Tucker, the manager of the South Charleston office, testified, is not all that clear, particularly because the tape was geared to the construction industry; and Tucker testified that the majority of the jobs he filled were not in construction. At any rate, at some times during the morning, applicants may merely be sitting around waiting to be referred to a job, others may be filling out the application, and others may be viewing the video.

Typically, when assigning an employee to a job, Respondent gives that employee a daily time ticket, which the employee takes to the job. At the end of the day, the person that the employee is working for writes the amount of the employee's hours on the ticket and then signs it. The employee then returns

¹ The relevant docket entries are: the Union filed the unfair labor practice charge on May 23, 1997, and the complaint was issued on August 12, 1997. The hearing was held in Charleston, West Virginia, on January 14, 1998.

² Although Respondent's dispatch procedures also provide for arbitration of all disputes, Respondent makes no claim that the instant dispute should be referred to arbitration.

to Respondent's office with the ticket, which is paid by Respondent. That is not a firm practice. If an employee is sent on a job where the employer there wants that employee to return, that employer can make arrangements for the employee's return until a particular job has been completed. To cover that event, Respondent had weekly time tickets, with room for the hours worked on a number of days.

In an effort to organize Respondent and certain of the employers to which Respondent supplied employees, on October 25, 1996, Huff went to Respondent's office in South Charleston to fill out an application for employment. He followed that on November 1 by bringing a busload of 40 union members and business agents. They also filled out applications. On about December 10, Wendy Twill, who, with Tucker, was the only permanent employee of Respondent, telephoned Huff at home to assign him to a job at Fesco in St. Albans, West Virginia, where he and Jack Day³ reported on December 10. They worked there, and engaged in organizing, the next 2 days and advised the owner by letter of their organizing efforts on December 12. Indeed, when Huff returned to Respondent's office that day, he gave Tucker a letter stating that he was trying to organize Respondent, too. Huff also complained that he had been told by Twill that he would be paid \$6.25 per hour, but he was paid only \$6.

The next day, at midmorning, affiliates of the Union picketed the Fesco jobsite with signs stating the Fesco was not in compliance with State licensing requirements and paid substandard wages. Huff and Day told Fesco's owner that they did not feel comfortable about working and returned to Respondent's office. When Huff reported to Fesco's jobsite on December 16, Fesco was no longer there, so Huff returned to Respondent's office and asked Tucker where Fesco was. Tucker replied that Huff should know, that he had Fesco run off the job.

Respondent's policy had required that applicants sign in its office an application for employment. Then, the applicants could go home, and Respondent would telephone if it had a job opening. Twill's call to Huff is an example of how the practice operated. On December 20, Tucker advised Huff on the telephone that starting immediately, all applicants would have to be present in the office in order to be referred to jobs. That was a change and meant that applicants sign in at the office each morning at 5:30 a.m. and wait until they were called to work. So, on December 30, Huff returned to Respondent's office and, with Day and Jason Canterbury,⁴ began to circulate a petition, which stated:

We the undersigned employees of Labor Ready Inc. do hereby respectfully request that the company would abandon the recently established policy of requiring employees to be in the office each morning to register for work.

As an alternative we would suggest the company could make referrals based on an applicant's date of registration and suitability for a particular job.

Recognizing that some positions must be filled on short notice, these referrals could go to applicants who are in the office on a particular date. Otherwise referrals could be by telephone as described above with the most senior,

qualified applicant being assigned to the position. Thank you for your consideration of this request.

Tucker told Huff that he could not circulate the petition because Respondent had a no-solicitation policy. Huff said that he did not see such a policy, but Tucker told him that he had to stop. Huff did, but, after checking with his senior officials at the Union, went back and again circulated the petition. Tucker told him to stop two more times, but Huff protested that he was in a nonworking area and that his right to circulate petitions in a nonworking area was protected by the Act. Huff said that a majority of the employees had signed and that they wanted to revert to the old policy of employees' not being required to report each day to be sent to work. Huff attempted to show the petition to Tucker that day and other days, but Tucker said that he was not interested in seeing it. Tucker replied that he had to abide by Respondent's policy.

When Huff went to Respondent's office on January 2 and 3, 1997, to continue to circulate the petition, there was no video camera, but there was on January 6, directed at the table where Huff and another union organizer, Gary Tillis, usually sat. Huff asked Tucker whether it was on, and Tucker replied that Huff would not think that it would be set up if it had not been turned on. Huff also asked what the camera was for, and Tucker replied that it was company business. Huff said that he thought it was intimidating and set up so that people would not sign his petition. Tucker replied that this was Respondent's business and none of Huff's business. On the next day, the recorder was placed in a different position, aimed at the only table that Huff, Day, Canterbury, and Tillis could sit at. (Respondent had designated one table, for applicants only, for them to fill out their applications.) Huff then told Tucker that he and the other applicants were statutory employees in a nonworking area, and they wanted to negotiate their desire that applicants be telephoned.

On February 10 or 11, Huff found out that Respondent was opening an office in Huntington. He went there, filled out an application, and saw a no-solicitation policy posted there. On February 18, Huff saw for the first time the same no-solicitation policy posted at the South Charleston office. On February 25, at about 5:30 a.m., Huff and Tillis went to the South Charleston office and attempted to circulate his petition. Tucker told him that he had to stop. Once again, Huff protested that he was a statutory employee, waiting to be assigned to work, in a nonworking area and was engaged in concerted activity. Shortly after, Tucker set up the video camera. Tucker told him two or three times that he had to stop, that there was a no-solicitation policy, that Tucker did not consider Huff available for work, and that he was a trespasser and a loiterer; otherwise, Tucker would call the police. Huff repeated what he had said earlier and added that he was not going to stop. A few hours later, Tucker told Huff that, because he had not complied with Respondent's policy, there would be no work available for him and that he was trespassing. South Charleston police officers showed up and requested that Huff leave the building. Huff complied. That evening, Tucker telephoned Huff and told him that he had not abided by Respondent's policy and, therefore, there was no work available for him and he was barred from Respondent's office. Huff returned the next day to return his hard hat and boots, and Tucker repeated what he had said on the telephone, adding that Huff was "permanently barred" from the office. A few weeks later, Huff went to Huntington, where he was also barred from the office. A few weeks later, Huff spoke to Tucker about the possibility of employment from Re-

³ Huff testified that Day was not a member of the Union. There is no other identification of Day in the record.

⁴ Canterbury was either a union member or employee and applied for employment with Respondent for the purpose of organizing.

spondent's Columbus, Ohio office. Tucker told Huff that he was permanently barred from all of Respondent's offices nationwide, a comment that was repeated in mid-May.

Labor Ready promulgated and maintained two no-solicitation policies. The first provided:

NO SOLICITING

Solicitation on the premises for any purpose and the distribution of literature are strictly prohibited

This rule⁵ violates the Act, which protects the right of employees to solicit in nonworking areas or during nonworking times. Because the policy prohibits all solicitation, including that which the Act protects, it is overly broad and violates Section 8(a)(1) of the Act. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Our Way, Inc.*, 268 NLRB 394 (1983); *Essex International, Inc.*, 211 NLRB 749 (1974); and *Stoddard-Quirk, Mfg. Co.*, 138 NLRB 615 (1962).

The second policy, the one that Huff first saw posted in the Huntington office and later in South Charleston,⁶ stated:

NO SOLICITATION POLICY

It is our objective to provide a comfortable work environment which allows employees to complete their tasks with the least amount of interruptions or disruptions. Thus, Labor Ready has established the following policy:

Nonemployees (including job applicants) are not allowed at any time to come upon company premises for the purpose of any form of solicitation or literature distribution. This policy prohibits third parties or strangers from soliciting or handing out materials for any reason, including but not limited to, political, union, charitable, or similar activities. For the purposes of this policy, applicants for employment, including but not limited to those waiting for a job assignment or referral, are considered nonemployees, strangers or third parties.

Employees are prohibited from distributing any form of literature or other materials in work areas. Employees are also prohibited from soliciting or distributing literature of any kind or for any cause during their assigned working time or soliciting an employee during that employee's working time at our site or a customer's site.

This policy, too, is invalid on its face. A job applicant for employment is an employee under Section 2(3) of the Act. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1951). This policy provides that applicants, including those waiting for job assignments or referrals, are "nonemployees" and thus unlawfully discourages them from engaging in protected and concerted activities that are protected by Section 7 of the Act, in violation of Section 8(a)(1).

Respondent contends that it was justified in prohibiting Huff from soliciting and barring him from employment when he

refused to comply with its second policy, because Huff was, first, not an employee and, second, was a union organizer. Clearly, under *Phelps Dodge*, he was an employee, because he was applying for a job. Furthermore, he was also an employee, because he had actually been sent to work by Respondent, his application for employment was on file,⁷ and he was waiting at Respondent's office for another assignment, as Respondent's rule required. Respondent contends that he could not be an employee because he had committed to Respondent's rule that each employee quit after each day's work. That was a rule, however, only on paper and not in practice. Huff testified, without contradiction, that Fesco's owners were so pleased with his and Day's work that they wanted them to remain on the job until the completion of the project. Huff explained to Tucker that he and Day lived approximately an hour away from Respondent's office and asked him for a weekly time ticket to record their work so that they did not have to return daily to Respondent's office but could return to the jobsite. Tucker agreed and gave them a weekly ticket. They were paid on Saturday, December 13, for a few days of work, not a single day. Thus, they did not quit each day, and Tucker knew that. Furthermore, the whole notion that every individual who sat in Respondent's waiting room was an "applicant" appeared to be a legal charade: even Tucker, during his testimony, frequently called the "applicants" his "employees." I conclude that the applicants were employees, entitled to the protections of the Act.

That Huff was a union organizer does not remove him from his status of an employee. *Town & Country Electric*, 309 NLRB 1250 (1992), enf. denied 34 F.3d 625 (8th Cir. 1994), revd. 516 U.S. 625 (1995). Respondent contends, however, that under *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), it was justified in banning his solicitation on its premises where reasonable alternative means of access to the employees existed. To find otherwise, it argues, hordes of union organizers would be permitted to descend on employers, giving the organizers "virtually unlimited and unconstitutional access to private property." The Board's decision in *Town & Country*, supra at 1257, disposed of that argument, noting that neither *Babcock & Wilcox* nor *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992),

interpret Section 2(3), or so much as hint that property rights may be resurrected as a device to bar activity long protected by the statute. Instead, they address the lawful restrictions that employers can place on nonemployees. [Footnote and citation omitted.]

Furthermore, the right to access to Respondent's property was given by Respondent, which required applicants to be physically present in order to get a job.⁸

If Huff had a right to a job, despite his union position, as the Supreme Court held in *Town & Country Electric*, supra, surely he had the right, as did all the other applicants, to exercise his Section 7 right to engage in concerted and protected activity, such as soliciting signatures on a petition from other applicants while he was not working. And Respondent had no lawful right to bar him from that Section 7-protected solicitation, just as it

⁵ Respondent's answer admitted the promulgation and maintenance of this rule, although no testimony was adduced about it.

⁶ In crediting Huff's testimony that the first time he saw the policy posted was in Huntington, I find that it was posted in North Charleston as a result of Huff's concerted activity and had not been posted earlier. If it had, Huff would have seen it. Furthermore, when Tucker first told Huff to stop soliciting on December 30 because it violated Respondent's no-solicitation rule, and Huff replied that he had not seen it, Tucker would have pointed it out if it were there.

⁷ Applicants fill out only one application, despite the application's provision that deems that the employees have quit each day.

⁸ If Tucker had complied with Huff's petition by permitting employees to receive assignments by telephone, Respondent could have avoided the very threat that it complains would exist if I found a violation.

had no right not to offer him a job, if one arose. Tucker attempted to justify his refusal to hire Huff because of his disruption of the office; but he could testify only that Huff was constantly talking to “our employees” and that he was constantly coming to the counter to ask questions. Tucker also mentioned some threats that he had heard about secondhand, but Huff credibly denied that he made any threats. The only unpleasant incident that Huff recalled involved a sexually provocative comment made to Canterbury, to which Canterbury took offense and Huff complained about to Tucker. But there was nothing else, and nothing in this record to show that Huff was disturbing the workplace or interfering with the smooth operation of Respondent’s business that warranted Respondent’s permanent bar of Huff from employment.⁹ Indeed, Tucker told Huff only that he was barred from further employment because he was in violation of the no-solicitation policy. He never mentioned any disruption or Huff’s refusal to leave the premises after having been asked to do so.

Respondent’s other arguments are similarly flawed. Its position is not aided by the line of decisions permitting employers to prohibit access to its property by off-duty employees.¹⁰ Respondent could have developed the same kind of rule, but instead required the opposite—that to obtain paying employment, applicants had to remain at Respondent’s office. Respondent also complains that Huff had “unclean hands” because, as a result of one of his purposes, to solicit membership in various affiliates of the Union, he actually obtained two cards; and that his efforts to organize employees is adverse to Respondent’s interest and, therefore, are not protected under *Town & Country Electric*, citing 516 U.S. at 90. That is simply a misunderstanding of what the Court stated and is fully answered by the Board’s decision in that case, 309 NLRB at 1257:

The Respondent and its amici vigorously contend that paid union organizers will engage in union activities to the detriment of work assigned by the employer or will embark on acts inimical to the employer’s legitimate interests. We do not agree. The statute’s premise is at war with the idea that loyalty to a union is incompatible with an employee’s duty to the employer. The fact that paid union organizers intend to organize the employer’s work force if hired establishes neither their unwillingness nor their inability to perform quality services for the employer. Indeed, because the organizers seek access to the jobsite for organizational purposes, engaging in conduct warranting discharge would be antithetical to their objective. No body of evidence has been presented that would support any generalized, or specific, finding that paid union organizers as a class have a significant, or indeed any, tendency to engage in such conduct.

In sum, Respondent’s rule forbidding nonemployees from any form of solicitation did not apply to Huff, who, as an employee under the Act, was free to engage in Section 7 activities on nonworking time, in a nonworking location, without threat or intimidation. Tucker unlawfully barred Huff from employ-

ment out of Respondent’s Charleston office and later unlawfully, permanently banned Huff from all of Respondent’s offices nationwide in retaliation for Huff’s protected circulation of the petition, in violation of Section 8(a)(1) of the Act. Because Tucker thought that Huff was organizing his “employees” and barred Huff from further employment for that reason, Respondent also violated Section 8(a)(3) of the Act.

Respondent’s use of a video camera was similarly unlawful. Tucker did not set up the camera until after he became aware of Huff’s circulation of the petition, Huff’s union activity at the Fesco jobsite, and Huff’s union affiliation by talking with him and seeing Huff wear his hat, jacket, and belt buckle with union insignia on them. The camera was thus used not only to surveil Huff’s union activities but also to surveil other applicants’ protected activities, to dissuade them from signing the petition, and to intimidate Huff from distributing and the other employees from signing union authorization cards. Tucker’s justification for the use of the camera that Huff was disruptive was unsupported by fact. The only disruption evidenced was of the the nonunion atmosphere that Tucker was attempting to protect. I also discredit Tucker’s testimony that, for the most part, the video camera was turned off and was turned on only to record Huff’s refusal to leave Respondent’s office. I find that it was turned on, as Tucker told Huff; but, even if it were not on all the time, the employees would have reasonably believed that it was set up to record their actions and was operating.¹¹ I conclude that Respondent violated Section 8(a)(1) of the Act.

THE REMEDY

Having found that Respondent violated the Act in certain respects, I shall order that it cease and desist therefrom and take certain affirmative actions designed to effectuate the purposes and policies of the Act. Specifically, having found that Respondent unlawfully prohibited Huff from entering its offices for the purpose of obtaining employment, I shall order Respondent to permit him access to do so and employment in the same or substantially equivalent positions in which Respondent previously employed him or for which he applied, without prejudice to any seniority or any other rights or privileges previously enjoyed or to which he would have been entitled in the absence of Respondent’s unfair labor practices. Additionally, I shall order Respondent to make Huff whole for any loss of earnings and other benefits he may have suffered by reason of the discrimination practiced against him from the date that Huff was prohibited from access to Respondent’s offices to the date that Respondent permits Huff access to its offices for the purposes of being assigned for employment and refers him for employment in the same manner as any other of its applicants.¹² Such amounts shall be computed in the manner prescribed in *F. W.*

¹¹ In so finding, I also discredit Tucker’s testimony that he was unaware of any solicitation between December 30, 1996, and February 25, 1997. The video camera was set up because he knew that the petitions were being signed in January.

¹² Respondent contends that, because Huff was insubordinate in refusing to leave the South Charleston office when Tucker asked him three times to do, the complaint should be dismissed. I decline to do so, and I understand Respondent’s point, because of the decisions it cited in support, is that Huff is not entitled to backpay. However, the decisions are inapposite. Huff did not refuse a work assignment or work-related order. He refused only to comply with Respondent’s unlawful interference with his Section 7 rights, its no-solicitation policy. Furthermore, Tucker never told Huff that he was barring him from future employment because Huff was insubordinate.

⁹ I had the impression that Tucker’s testimony had been thoroughly prepared and that at least some of his answers had been scripted. In addition, many of his answers were given to leading questions. I did not find him particularly believable.

¹⁰ Respondent cites, among other decisions, *Tri-County Medical Center, Inc.*, 222 NLRB 1089 (1976); and *GTE Lenkurt, Inc.*, 204 NLRB 921 (1973).

Woolworth Co., 90 NLRB 289 (1950), with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The General Counsel contends that, because Huff was banned from all of Respondent's offices nationwide and because the no-solicitation policy was maintained and in effect at all the other offices, notices should be posted at all of Respondent's offices nationwide. I agree. Both of Respondent's policies are illegal and affect applicants across the country. All of Respondent's employees should be advised of their rights.

On these findings of fact and conclusions of law and on the entire record, including my observation of the demeanor of the witnesses as they testified, I issue the following recommended¹³

ORDER

Respondent Labor Ready, Inc., South Charleston, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining in effect or enforcing any rule or policy which prohibits its employee applicants and its other employees from soliciting other employee applicants and other employees on its premises or in other nonworking areas and during nonworking times.

(b) Threatening to call or calling the police to remove its employees or employee applicants because they engage in activities on behalf of the Tri-State Building and Construction Trades Council, National Building and Construction Trades Department, AFL-CIO (the Union), or any other labor organization or because they engage in other protected and concerted activities.

(c) Engaging in surveillance of its employees or employee applicants, or giving the impression of engaging in surveillance, with respect to their union or protected and concerted activities.

(d) Barring its employees or employee applicants from its facilities or otherwise denying them employment opportunity because they engage in activities on behalf of the Union or any other labor organization or because they engage in other protected and concerted activities.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind and abrogate its rules and policies insofar as they prohibit solicitation by its employees and employee applicants in nonworking areas and on nonworking time and notify its employees and employee applicants that it has taken such action and that henceforth they may engage in such actions subject to the limitations permissible under the Act.

(b) Within 14 days of this Order, notify Donald Huff that he is free to return to any of Respondent's facilities to attempt to secure work and offer him employment in jobs for which he applied or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to his seniority or any other rights or privileges to which he would have been entitled if he had not been discriminated against.

(c) Make Donald Huff whole for its discrimination against him by paying him backpay to compensate him for any hours he would have worked had it not barred him from employment or from seeking employment, in the manner set forth in the remedy section of this decision.

(d) Within 14 days of this Order, remove from its files any reference to its unlawful refusal to hire Donald Huff and, within 3 days thereafter, notify him in writing that this has been done and that the discrimination will not be used against him in any way.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at all of its facilities copies of the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has closed any of its facilities, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since December 30, 1996.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain in effect or enforce any rule or policy which prohibits our employee applicants and our other employees from soliciting other employee applicants and other employees on our premises or in other nonworking areas and during nonworking times.

WE WILL NOT threaten to call or call the police to remove our employees or employee applicants because they engage in activities on behalf of the Tri-State Building and Construction Trades Council, National Building and Construction Trades Department, AFL-CIO (the Union), or any other labor organization.

¹³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

zation or because they engage in other protected and concerted activities.

WE WILL NOT engage in surveillance of our employees or employee applicants, or give the impression of engaging in surveillance, with respect to their union or protected and concerted activities.

WE WILL NOT bar our employees or employee applicants from our facilities or otherwise deny them employment opportunity because they engage in activities on behalf of the Union or any other labor organization or because they engage in other protected and concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind and abrogate our rules and policies insofar as they prohibit solicitation by our employees and employee applicants in nonworking areas and on nonworking time and notify our employees and employee applicants that we have

taken such action and that henceforth they may engage in such actions subject to the limitations permissible under the Act.

WE WILL within 14 days of the Board's Order notify Donald Huff that he is free to return to any of Respondent's facilities to attempt to secure work and offer him employment in jobs for which he applied or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to his seniority or any other rights or privileges to which he would have been entitled if he had not been discriminated against.

WE WILL make Donald Huff whole for our discrimination against him by paying him backpay to compensate him for any hours he would have worked had we not barred him from employment or from seeking employment, with interest.

WE WILL within 14 days of the Board's Order, remove from our files any reference to our unlawful refusal to hire Donald Huff and, within 3 days thereafter, notify him in writing that this has been done and that the discrimination will not be used against him in any way.

LABOR READY, INC.